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**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF MINIDOKA**

<b>A&amp;B IRRIGATION DISTRICT,</b>	)	
	)	Case No. CV-07-665
Petitioner,	)	
	)	
vs.	)	<b>RESPONSE TO MOTION TO</b>
	)	<b>STRIKE THIRD AFFIDAVIT OF</b>
<b>DAVID R. TUTHILL, JR.,</b> in his official	)	<b>DAVID R. TUTHILL, JR., DIRECTOR</b>
capacity as director of the Idaho Department	)	
of Water Resources, and <b>THE IDAHO</b>	)	
<b>DEPARTMENT OF WATER</b>	)	
<b>RESOURCES</b>	)	
	)	
Respondents.	)	
_____	)	

COME NOW, State Respondents, David R. Tuthill, Jr., Director of the Idaho Department of Water Resources ("Director") and the Idaho Department of Water Resources, an executive agency of the state of Idaho ("Department"), by and through the undersigned deputy attorney

general, and respectfully submit this Response to A&B Irrigation District's ("A&B") *Motion to Strike Affidavit of David R. Tuthill, Jr., Dated October 26, 2007* ("Motion").

The October 26, 2007 affidavit of Director David R. Tuthill ("Affidavit") was filed after the October 23, 2007 hearing; however, the filing of the Affidavit is neither untimely nor prejudicial and it should therefore not be stricken from the record.

Attached to the Affidavit was an order ("Order") issued on October 26, 2007 by hearing officer Gerald F. Schroeder.<sup>1</sup> As the A&B delivery call is an on-going administrative proceeding, subsequently occurring administrative actions will necessarily happen. And as the Court continues to retain jurisdiction over this matter, it is incumbent upon the parties to keep the Court informed of relevant activity in the delivery call proceeding. In providing the Court with the Order the same day it was issued, the Department was keeping the Court abreast of the most recent administrative activity.

Moreover, the Order is particularly relevant to the current proceeding as A&B has asserted that the Department has not taken action on its delivery call and should therefore be subject to a writ of mandate. The Order directs pre-hearing action in requiring that the Department provide the parties and the hearing officer with a written report of its technical and factual understanding of the delivery call by January 15, 2008. The Order therefore shows relevant, continuing actions that the Department is taking in response to the delivery call.

Finally, A&B states that the Affidavit and attached Order are prejudicial and should be stricken from the record. The Department is involved in litigation before this Court and is providing timely and relevant information to demonstrate that it should not be subject to a writ of

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<sup>1</sup> The Order may be found on the Department's website:


[http://www.idwr.idaho.gov/Calls/A&B\\_Irrigation\\_Call/A&B\\_2007\\_Filings/Admin\\_docs/Order\\_Regarding\\_Preliminary\\_Findings\\_Of\\_Fact\\_And\\_Intent\\_To\\_Remain\\_A\\_Party.pdf](http://www.idwr.idaho.gov/Calls/A&B_Irrigation_Call/A&B_2007_Filings/Admin_docs/Order_Regarding_Preliminary_Findings_Of_Fact_And_Intent_To_Remain_A_Party.pdf)

mandate because action is being taken on the delivery call. Because of the on-going nature of the administrative proceeding, and the fact that A&B has stated that the Department is not taking action on its delivery call, it cannot be deemed prejudicial for the Department to provide the Court with an order issued by the hearing officer.

RESPECTFULLY SUBMITTED this 31<sup>st</sup> day of October, 2007.

LAWRENCE G. WASDEN  
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Chief, Natural Resources Division

  
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Idaho Department of Water Resources

  
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CHRIS M. BROMLEY  
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Idaho Department of Water Resources

### CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am a duly licensed attorney in the State of Idaho, employed by the Attorney General of the State of Idaho and residing in Boise, Idaho; and that I served one (1) true and correct copy of the following described document on the persons listed below by mailing in the United States mail, first class, with the correct postage affixed thereto on this 31<sup>st</sup> day of October 2007.

Document(s) served: RESPONSE TO MOTION TO STRIKE THIRD AFFIDAVIT OF  
DAVID R. TUTHILL, JR., DIRECTOR


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